

ACTION

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December 15, 2009

The Honorable Judith Enck,
Regional Administrator
United States Environmental Protection Agency Region II
290 Broadway
New York, NY 10007

Dear Regional Administrator Enck:

Congratulations on your appointment as EPA Regional Administrator. We look forward to working with you to promote environmental protection throughout the region.

We write on behalf of the New Jersey Chapter of the Sierra Club. The Sierra Club believes that the recent enactment of the New Jersey Site Remediation Reform Act (Pub. Law 2009, c. 60) (SRRA) may threaten public health and the protection of critical environmental resources in New Jersey.

As you know, EPA requires that states receiving federal funding develop and administer a Statewide Quality Assurance System, including a Quality Management Plan, in line with EPA regulations. 40 C.F.R. §§ 31, 35. These EPA regulations list specific requirements for a state's environmental program and acceptable quality assurance for federally funded programs. Earlier this year, EPA completed an audit of the New Jersey Department of Environmental Protection's Quality Assurance System. U.S. Environmental Protection Agency- Region 2, Quality System Assessment, NJ Department of Environmental Protection, August 2009 (EPA 2009 Audit).

The EPA Audit identified a number of serious deficiencies in the N.J.DEP Site Remediation program. EPA found a significant lack of oversight by the DEP, with no procedures set forth to conduct and monitor site remediation. EPA found that DEP employees had little to no knowledge of the Quality Assurance Program and allowed non-DEP professionals involved in the remediation process far too much discretion. EPA suggested that the SRRA would provide DEP with a beneficial opportunity to address and correct EPA's concerns. Unfortunately, the law as passed and thus far implemented utterly fails to remedy the identified problems.

The enactment of the SRRA, which cedes responsibility for site remediation to private professionals, fails to solve the problems identified in the EPA audit. In fact, in many respects the SRRA only aggravates the shortcomings that EPA highlighted in DEP's previous site remediation program.

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This letter briefly describes the new SRRA program, lays out the relevant deficiencies EPA found in the audit, and explains how the SRRA fails to remedy each of the deficiencies identified.

Importantly, in its audit, EPA committed to "assisting NJDEP's OQA and Site Remediation Bureaus in developing and implementing a well documented and transparent Quality System," for the new site remediation program. EPA should therefore continue to monitor the LSRP program implementation, with its focus on New Jersey's statewide quality assurance failures.

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I. Summary of the Recently-Enacted New Jersey Site Remediation Reform Act

The SRRA modifies the site remediation process in New Jersey by shifting primary responsibility for certifying compliance from the DEP to licensed site remediation professionals (LSRPs) who are hired by the owner or operator of the contaminated property. The LSRP devises and oversees a remediation plan that brings the property into compliance with environmental standards established by DEP regulations. Pub. Law 2009, c. 60 § 14. Once a remediation plan has been completely implemented, the LSRP submits a Response Action Outcome (RAO) to DEP. Pub. Law 2009, c. 60 § 14(d). The RAO is a certification that the contaminated site has been remediated, which, by operation of law, becomes a covenant from the State not to sue. Pub. Law 2009, c. 60, § 31(a).

The SRRA also creates a Site Remediation Professional Licensing Board (the Board), charged with issuing licenses to LSRPs and establishing LSRP licensing and practice standards. Pub. Law 2009, c. 60 § 5-9. The Board has primary responsibility for enforcing LSRP compliance with those standards. Pub. Law 2009, c. 60, §§ 17(a)-(b). The Board is made up of eleven members: the commissioner of the DEP, the state geologist, six LSRPs, three members of statewide organizations that promote the protection of the environment, and one representative from the business community. Pub. Law 2009 c. 60 § 3(b). The Board is required to audit the "submissions and conduct" of at least 10 percent of the LSRPs. Pub. Law 2009, c. 60, §§ 23.

The SRRA places the responsibility for most of the oversight of the LSRPs with the Licensing Board. Nonetheless, DEP is charged with issuing regulations that define the "responsibilities" of LSRPs and property owners. Pub. Law 2009, c. 60, § 29. DEP must "inspect" all documents submitted by an LSRP and, under certain circumstances, must "perform additional review of any document or [of] the performance of a remediation...." Pub. Law 2009, c. 60, §§ 21(b)-(c). DEP shall, at a minimum, provide further review of 10% of documents submitted annually by an LSRP. Pub. Law 2009, c. 60, § 21(f). DEP must invalidate any RAO when it determines that "the remedial action is not protective of public health, safety, or the environment." Pub. Law 2009, c. 60, § 22. The SRRA defines neither "inspect" nor "further review."

II. Issues That EPA Should Address

Sierra Club shares the criticisms that EPA expressed in its 2009 Audit of the former New Jersey site remediation program. Of even greater concern is the fact that the deficiencies identified in the audit have not been addressed or remedied by the SRRA. Moreover, Sierra Club believes

that DEP's deficient performance in Quality Assurance will prevent DEP from implementing its new and more limited role under the SRRA.

A. The SRRA Affirmatively Relieves NJDEP of Any Meaningful Oversight of the Site Remediation Program

1. SRRA Does Not Require Sufficient Inspection of Remediation Documents

In its audit of N.J. DEP's QA system, EPA found that the Office of Quality Assurance "...has not performed oversight of the Site Remediation Program to ensure compliance with the existing Quality System." (EPA Audit, Finding Two). By failing to require any substantial review of the LSRP program, the SRRA further aggravates the oversight deficiency highlighted by EPA.

The SRRA merely requires DEP to "inspect" all documents submitted by an LSRP without defining the term. "Inspection" may mean simply checking to ensure that the forms are complete without requiring any review of the substance of the documents. DEP must perform "further review" of ten percent of the documents submitted by an LSRP, though there is no explanation of what that process actually entails. The SRRA therefore allows up to 90 percent of the work done by private individuals to be approved with only a cursory inspection. The SRRA's "requirement" for DEP to merely "inspect" all documents submitted by LSRPs appears to codify the "data validation" deficiencies that EPA found in DEP's current system.

EPA's audit found that none of the Site Remediation Program's bureaus did any project assessment and/or process improvement beyond data validation. (EPA Audit, Finding 8). In order to remedy this deficiency, EPA required that DEP

[E]stablish processes and procedures to assure that all activities performed during environmental data operations... are assessed regularly and the findings reported to management to ensure that the requirements stated in approved and current planning documents are being implemented as prescribed. (Finding 8, Required Corrective Action).

DEP's oversight system of the LSRP program clearly does not take into account EPA's finding. Requiring DEP to merely "inspect" all documents submitted by LSRPs appears to be precisely the same as the "data validation" that EPA found to be deficient in DEP's current system.

2. The SRRA Does Not Require DEP to Perform Any On-site Testing

In its audit, EPA also faulted DEP for not performing any field audits, split samples, internal assessments, etc in its oversight program (EPA Audit, Finding 6). The SRRA does not require DEP to perform any such tasks. Instead, the SRRA delegates nearly all of DEP's audit and assessment activities to the LSRPs, on whose paperwork DEP audits will exclusively rely. Under the SRRA, it is the LSRP, not DEP, who visits the site and performs all the requisite testing. This massive delegation of the quality assurance functions to the LSRP does not begin to maintain the high standards of quality assurance demanded by EPA and to protect public health in light of the obligations the LSRP has to the site owner. The fact that the LSRP has been hired by the site owner creates a clear conflict of interest.

3. The SRRA Will Allow Insufficient RAOs to be Issued

While the SRRA requires DEP to invalidate any RAO that it finds to be inadequate in protecting health, safety or the environment, the likelihood that DEP will even identify those that fail to meet its standards is minute. The minimal oversight required by the Act practically ensures that inadequate RAOs will go completely unnoticed by the DEP. This creates an untenable situation in which faulty RAOs which, by operation of law prohibit the state from suing the property owner in the future, will routinely be issued. This high potential for error is unacceptable and undermines the appropriate Quality Assurance Program that EPA demanded in its audit.

4 B. The SRRA Provides Far Too Much Discretion for LSRPs

EPA found problematic the fact that DEP employees considered Responsible Party contractors to be "certified professionals... taken at their word." (EPA Audit Finding 8). This finding exemplifies a central problem with the SRRA. Under the SRRA, LSRPs are given virtually the same unchecked discretion that EPA criticized in the DEP Site Remediation program. EPA requires instead that the "adequacy and effectiveness of corrective actions shall be confirmed, verified, and documented." (EPA Audit, Finding 8). Not only does DEP fail to address this concern with the LSRP program, it gives private individuals even more discretion and provides no assurance that they will be monitored by DEP.

LSRPs are responsible for conducting remediation without the prior approval of the DEP. The LSRP may implement whatever remediation plan he deems appropriate, following the technical standards adopted by DEP law and regulation. When there are no applicable technical standards adopted by DEP, however, the LSRP must use his "professional judgment" and find guidance in relevant EPA and state practices. Requiring that the LSRP implement a remediation plan without approval of DEP and, in many cases, permitting the LSRP to use his own judgment in deciding which standards to apply allows far too much discretion for a private individual hired by the polluter.

C. The Roles of DEP Offices and Bureaus are not Outlined in the SRRA

The EPA Audit found that DEP's Site Remediation program lacked any documented procedures identifying Quality System roles and responsibilities of any of the DEP offices or bureaus. (EPA Audit, Finding 1). The SRRA does not sufficiently describe how and who within DEP will be involved in the LSRP program. EPA requires that DEP develop a "detailed description of the QA Roles and Responsibilities of all bureaus, offices and programs..." The SRRA does little to meet this requirement. Though the Act explains when DEP involvement may be necessary, it does not describe the specific procedures DEP must follow, nor does it clarify which offices and bureaus within DEP will perform which oversight actions. None of the guidance documents that DEP has published on its Site Remediation website provide any guidance for DEP. Finally, the regulations promulgated under the SRRA do not describe any Quality System roles for offices within DEP. As EPA noted in its audit, oversight is completely ineffective when none of the offices within DEP knows what is its role in the oversight function.

D. The DEP is Incapable of Providing Effective Oversight of the LSRP Program

While the SRRA does not provide a significant oversight role for DEP, what little authority is granted to the Department is likely to prove ineffectual, given DEP's repeated failures to operate its internal site remediation program. The EPA Audit clearly demonstrated that DEP was incompetent in running the site remediation program, and DEP will prove equally inept in supervising the SRRA.

The EPA Audit shows that the DEP Site Remediation Program was operating outside of the NJDEP's Quality System, and therefore in dereliction of its obligation under 40 C.F.R. §§ 30, 35. Furthermore, the DEP Office of Quality Assurance was aware of the deviation from Quality System standards and failed to act (EPA Audit, Finding 2). DEP has shown that it has not and cannot (even after the EPA audit) ensure compliance with regulations and statutes. Unless DEP makes serious changes to remedy its deficiencies, the implementation of the SRRA will seriously jeopardize the success of remediation operations in New Jersey.

DEP will be ineffectual in assuring compliance with EPA Quality System requirements. The DEP's role in the new SRRA site remediation program is limited to three primary functions: "inspecting" documents submitted during remediation projects, invalidating RAOs, and taking direct oversight of a remediation project under certain circumstances. CITE The EPA Audit has already revealed that managers and staff within the DEP are unaware or confused about quality assurance programs (EPA Audit, Findings 3, 4, 5, and 6). Thus, the DEP site remediation program is already dysfunctional and is not well situated to adequately supervise the LSRP program established by the SRRA.

In situations where the SRRA commands that DEP take direct oversight of the remediation, the same problems with the site remediation program identified in the EPA Audit will plague DEP. For example, DEP will undertake direct oversight of remediation at sites "requiring the highest priority" ranking based upon the "level of risk to the public health" (N.J.S.A. 58:10C-27(b)(4) referring to N.J.S.A. 58:10-23.16)). Thus, DEP may be responsible for directly overseeing the most publicly dangerous remediation operations. This role for DEP directly threatens the public health.

An amendment to the SRRA was recently proposed in the NJ legislature, which provides that sites which are under direct oversight by DEP will also be immune from suit by the state once the remediation is deemed complete (S. 3040, 213th Sess. (N.J. 2009)). The most critical site remediation operations, once deemed complete by a body itself unfit to conduct competent remediation, would be immune from suit by the state should the amendment pass. Even more dangerous, the amendment permits DEP to issue covenants not to sue as part of a settlement of litigation (S. 3040 §6(f)(2), 213th Sess. (N.J. 2009)). Thus, even properties deemed to be insufficiently remediated may be protected from civil liability and restoration responsibilities imposed by the state.

DEP has already demonstrated that it is incapable of running a remediation program that complies with the required EPA Quality Assurance standards. The SRRA and related guidance documents provide no additional or remedial training for DEP employees whom EPA found to

we should consider sending a comment on this proposed amendment


be unaware of the most basic elements of the Quality Assurance plan. Some DEP employees did not even know that a QA plan existed. (EPA Audit, Finding 5). The EPA Audit clearly determined that the site remediation program within the DEP was operating outside the DEP's Quality Assurance System. The DEP has not developed a plan to remedy the deficiencies within the DEP itself. The Department is therefore unable to sufficiently oversee the LSRP program.

E. The System Created by the SRRA Threatens the Public Health and the Environment

The SRRA creates a system that jeopardizes the public welfare where the most important health and safety decisions—the appropriate remediation of contaminated property—will be certified by a private consultant paid by the owner of the contaminated property. The EPA's most basic mandate is to "protect human health and the environment," and the SRRA clearly undermines this fundamental commitment. (EPA, About EPA, <http://www.epa.gov/epahome/aboutepa.htm>) The SRRA creates a conflict of interest, as the LSRP, who is hired by the property owner and is ultimately responsible for granting an RAO to the owner, cannot simultaneously protect the interests of the public and the financial interests of the his client. Under the statute, the RAO serves as a covenant not to sue, indemnifying the property owner from any further liability associated with the remediation. Even more troubling, neither the SRRA nor the DEP require any public notice of the filing of an RAO, and if the DEP does not specify an RAO for "further review" or invalidate it, the RAO is automatically approved. This process, which provides no opportunity for public involvement and delegates (and perhaps abdicates) the state's authority to hold polluters responsible for contamination, threatens public health and safety and conflicts with the mandates of the EPA and DEP.

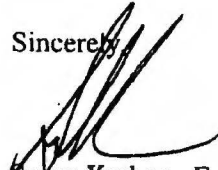
III. Conclusion

In its audit, EPA referred to the deficiencies first identified in its 2005 audit and observed that "many of the corrective actions identified in NJDEP's April 21, 2006 Corrective Action Plan were never completed by NJDEP." Nevertheless, in the 2009 audit, EPA reiterated that it is committed to assisting the New Jersey DEP in implementing a transparent and effective site remediation program. The SRRA falls far short of creating such a program, threatens the health and safety of New Jersey citizens, and places greater reliance on a system that has been determined to be broken.

 Sierra Club respectfully requests that EPA direct NJDEP to forestall the implementation of the LSRP program until these requirements have been fully and effectively implemented to EPA's satisfaction.

We would be happy to provide any additional information that may assist you in this important work. Thank you in advance for your prompt and thorough review of this matter.

Sincerely,


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cc: Governor John Corzine
William Castner, Chief Counsel to the Governor
Mark Mauriello, Commissioner, NJDEP

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